

AMENDED IN ASSEMBLY JUNE 24, 2009

AMENDED IN ASSEMBLY JUNE 16, 2009

AMENDED IN SENATE APRIL 21, 2009

AMENDED IN SENATE APRIL 2, 2009

SENATE BILL

No. 340

Introduced by Senator Yee
(Coauthor: Senator DeSaulnier)
(Coauthor: Assembly Member Torlakson)

February 25, 2009

An act to add Article 9 (commencing with Section 17600) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 340, as amended, Yee. Advertising: automatic renewal ~~purchases~~ *and continuous service offers*.

Existing law prohibits any person with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, from making or disseminating or causing to be made or disseminated before the public in this state, or in any state, any statement concerning that property or those services that is untrue or misleading, and that is known to be untrue or misleading, or for any person to make or disseminate or cause to be made or disseminated a statement as part of a plan or scheme with the intent not to sell that property or those services so advertised at the price stated. A violation of these provisions is a crime, punishable by

specified penalties, and a violation of those provisions is subject to specified civil liability.

~~This bill would require all marketing materials containing an offer with an automatic renewal, as defined, to comply with specified requirements, including that the automatic renewal offer terms, as defined, be presented in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled, that the business obtain the customer's consent to the terms, and that the marketing materials comply with various other requirements. The bill would require, for printed marketing materials, that the automatic renewal offer terms be presented together preceded by a title identifying them as the "Automatic Renewal Terms," "Continuous Service Terms," or other similar description, in accordance with certain procedures. The bill would impose similar requirements for automatic renewals and continuous service offers made on an Internet Web page. The bill would also require, in any automatic renewal offer made over the telephone, that the business comply with federal regulations, as specified.~~

The bill would, on and after June 1, 2010, make it unlawful for any business making an automatic renewal, as defined, or continuous service, as defined, offer to a consumer in this state to, among other things, fail to present the automatic renewal offer terms or continuous service offer terms in a clear and conspicuous manner, charge the consumer for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent, and to fail to provide the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. In the case of a material change in the terms of the automatic renewal or continuous service offer, the bill would require the business to provide the consumer with a clear and conspicuous notice of the material change and information regarding how to cancel. The bill would declare the intent of the Legislature in this regard.

The bill would provide that in any case in which a business sends any goods, wares, merchandise, or products to a customer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the customer's affirmative consent, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the customer.

A violation of these provisions would not be a crime, but would be subject to enforcement by any available civil remedies, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Article 9 (commencing with Section 17600) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 9. Automatic Purchase Renewals

17600. It is the intent of the Legislature to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service.

17601. For the purposes of this article, the following definitions shall apply:

(a) "Automatic renewal" means a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.

(b) "Automatic renewal offer terms" means the following clear and conspicuous disclosures:

(1) That the subscription or purchasing agreement will continue until the consumer cancels.

(2) The description of the cancellation policy that applies to the offer.

(3) The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known.

(4) The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer.

(5) The minimum purchase obligation, if any.

(c) "Clear and conspicuous" or "clearly and conspicuously" means in larger type than the surrounding text, or in contrasting

1 type, font, or color to the surrounding text of the same size, or set
2 off from the surrounding text of the same size by symbols or other
3 marks, in a manner that clearly calls attention to the language. In
4 the case of an audio disclosure, “clear and conspicuous” and
5 “clearly and conspicuously” means in a volume and cadence
6 sufficient to be readily audible and understandable.

7 (d) “Continuous service” means a plan or arrangement in which
8 a subscription or purchasing agreement continues until the
9 consumer cancels the service.

10 17602. (a) It shall be unlawful for any business making an
11 automatic renewal or continuous service offer to a consumer in
12 this state to do any of the following:

13 (1) Fail to present the automatic renewal offer terms or
14 continuous service offer terms in a clear and conspicuous manner
15 before the subscription or purchasing agreement is fulfilled and
16 in visual proximity, or in the case of an offer conveyed by voice,
17 in temporal proximity, to the request for consent to the offer.

18 (2) Charge the consumer’s credit or debit card or the
19 consumer’s account with a third party for an automatic renewal
20 or continuous service without first obtaining the consumer’s
21 affirmative consent to the agreement containing the automatic
22 renewal offer terms or continuous service offer terms.

23 (3) Fail to provide the automatic renewal or continuous service
24 offer terms, cancellation policy, and information regarding how
25 to cancel in a manner that is capable of being retained by the
26 consumer. If the offer includes a free trial, the business shall
27 disclose how to cancel and allow the consumer to cancel before
28 the consumer pays for the goods or services.

29 (b) A business making automatic renewal or continuous service
30 offers shall provide a toll-free telephone number, electronic mail
31 address, a postal address only when the seller directly bills the
32 customer; or another cost-effective, timely, and easy-to-use
33 mechanism for cancellation that shall be described in the written
34 acknowledgment.

35 (c) In the case of a material change in the terms of the automatic
36 renewal or continuous service offer that has been accepted by a
37 consumer in this state, the business shall provide the consumer
38 with a clear and conspicuous notice of the material change and
39 provide information regarding how to cancel in a manner that is
40 capable of being retained by the consumer.

1 (d) *The requirements of this article shall apply only prior to the*
2 *completion of the initial order for the automatic renewal or*
3 *continuous service, except as follows:*

4 (1) *The requirement in paragraph (3) of subdivision (a) may be*
5 *fulfilled after completion of the initial order.*

6 (2) *The requirement in subdivision (c) shall be fulfilled prior*
7 *to implementation of such material change.*

8 17603. *In any case in which a business sends any goods, wares,*
9 *merchandise, or products to a consumer, under a continuous*
10 *service agreement or automatic renewal of a purchase, without*
11 *first obtaining the consumer's affirmative consent as described in*
12 *Section 17602 to automatic renewal offer terms, the goods, wares,*
13 *merchandise, or products shall for all purposes be deemed an*
14 *unconditional gift to the consumer, who may use or dispose of the*
15 *same in any manner he or she sees fit without any obligation*
16 *whatsoever on the customer's part to the business, including, but*
17 *not limited to, bearing the cost of or responsibility for shipping*
18 *any goods, wares, merchandise, or products to the business.*

19 17604. (a) *Notwithstanding Section 17534, a violation of this*
20 *article shall not be a crime. However, all available civil remedies*
21 *that apply to a violation of this article may be employed.*

22 (b) *If a business complies with the provisions of this article in*
23 *good faith, it shall not be subject to civil remedies.*

24 17605. *The following are exempt from the requirements of this*
25 *article:*

26 (a) *Any service provided by a business or its affiliate where*
27 *either the business or its affiliate is doing business pursuant to a*
28 *franchise issued by a political subdivision of the state or a license,*
29 *franchise, certificate, or other authorization issued by the*
30 *California Public Utilities Commission (CPUC).*

31 (b) *Any service provided by a business or its affiliate where*
32 *either the business or its affiliate is regulated by the CPUC, the*
33 *Federal Communication Commission, or the Federal Energy*
34 *Regulatory Commission.*

35 (c) *Any entity regulated by the Department of Insurance.*

36 (d) *Alarm company operators, as defined in Section 7590.2,*
37 *and regulated pursuant to Chapter 11.6 (commencing with Section*
38 *7590) of Division 3.*

1 (e) A bank, bank holding company, or the subsidiary or affiliate
2 of either, or a credit union or other financial institution, licensed
3 under state or federal law.

4 17606. This article shall become operative on June 1, 2010.

5 17600. It is the intent of the Legislature to end the practice of
6 charging consumer credit cards without their explicit consent for
7 ongoing shipments of a product or ongoing deliveries of service.

8 17601. For the purposes of this article:

9 (a) “Automatic renewal” means a plan or arrangement in which
10 a subscription or purchasing agreement is automatically renewed
11 at the end of a definite term for a subsequent term.

12 (b) “Automatic renewal offer terms” means the following clear
13 and conspicuous disclosures:

14 (1) That the subscription or purchasing agreement will continue
15 unless the customer cancels.

16 (2) The description of the cancellation policy.

17 (3) That the customer will be billed, that his or her online
18 payment account will be charged, or other description of the
19 payment method.

20 (4) The length of the automatic renewal term or that the service
21 is continuous, unless the length of the term is chosen by the
22 customer.

23 (5) That the price for future automatic renewal terms may
24 change.

25 (6) The minimum purchase obligation, if any.

26 (c) “Clear and conspicuous” or “clearly and conspicuously”
27 means in larger type than the surrounding text, or in contrasting
28 type, font, or color to the surrounding text of the same size, or set
29 off from the surrounding text of the same size by symbols or other
30 marks, in a manner that clearly calls attention to the language.
31 With respect to any communication through any nonprint medium,
32 audio disclosures shall be delivered in a volume and cadence
33 sufficient to be readily audible and understandable.

34 (d) “Continuous service” means a plan or arrangement in which
35 a subscription or purchasing agreement continues until the customer
36 cancels the service.

37 (e) “Customer” means a person who accepts an offer or portion
38 or features of an offer, but does not mean commercial customers;
39 including those accepting an offer through business-to-business
40 contracts.

1 (f) “Marketing materials” include any offer, solicitation, script,
2 product description, publication, or other promotional materials;
3 renewal notice, purchase order device, fulfillment material, or any
4 agreement for the sale or trial viewing of products that are delivered
5 in person or by mail, television or radio broadcast, e-mail, Internet,
6 Internet Web page, or telephone or other telecommunication device,
7 or appearing in any newspaper or magazine, on any insert thereto,
8 or on any Internet link or pop-up window.

9 17602. All marketing materials containing an offer with an
10 automatic renewal shall comply with all of the following:

11 (a) The automatic renewal offer terms shall be presented in a
12 clear and conspicuous manner and these terms, as well as the
13 cancellation policy, shall be presented before the subscription or
14 purchasing agreement is fulfilled.

15 (b) The business shall obtain the customer’s affirmative consent
16 that he or she agrees to the automatic renewal offer terms.

17 (c) The automatic renewal offer terms, cancellation policy, and
18 how to cancel shall appear in a written acknowledgment that can
19 be retained by the customer. The written acknowledgment may be
20 mailed to the customer separately or included with a welcome
21 letter or the first invoice or first delivery of the subscription or
22 purchase. The customer’s ability to store or print the automatic
23 renewal offer terms, cancellation policy, and how to cancel shall
24 comply with this subdivision. If the offer includes a free trial, the
25 business shall disclose how to cancel before the customer pays for
26 the goods or services.

27 (d) A business making automatic renewal offers shall provide
28 a toll-free telephone number or another cost-effective and consumer
29 friendly mechanism for cancellation to be described in the written
30 acknowledgment.

31 (e) The marketing materials, when viewed as a whole, shall not
32 misrepresent the material terms of the offer.

33 (f) The requirements of this article shall apply prior to the
34 completion of the initial order and then again only prior to any
35 material change in the terms of the automatic renewal.

36 17603. For printed marketing materials, the automatic renewal
37 offer terms shall be presented together, preceded by a title
38 identifying them as the “Automatic Renewal Terms,” “Continuous
39 Service Terms,” or other similar description. The automatic renewal
40 terms shall be presented in accordance with either of the following:

~~(a) The automatic renewal offer terms shall appear on the order form.~~

~~(b) On the order form, the offer shall clearly and conspicuously (1) refer to the subscription or purchasing agreement using the term “automatic renewal,” “continuous service,” or other words of similar meaning, (2) state that the customer is agreeing to the automatic renewal, and (3) specify where the full terms of the automatic renewal offer may be found.~~

~~17604. In any automatic renewal offer made over the telephone, a business shall comply with Section 310.4(a)(6)(i)(C) and Section 310.5(a)(5) of Title 16 of the Code of Federal Regulations. An offer consisting of printed material that directs the customer to place an inbound call to a telephone number as the method of ordering shall be considered an offer made over the telephone.~~

~~17605. In any automatic renewal or continuous service offer made on an Internet Web page, the automatic renewal offer terms shall be preceded by a title identifying them as the “Automatic Renewal Terms,” “Continuous Service Terms,” or other similar description.~~

~~17606. All automatic renewal provisions in this article shall apply to a continuous service. Marketing materials for month-to-month contracts containing an offer with an automatic renewal shall be required to comply with the requirements of this article only prior to the completion of the initial order and then again only prior to any material change in the terms of the automatic renewal.~~

~~17607. In any case in which a business sends any goods, wares, merchandise, or products to a customer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the customer’s affirmative consent to automatic renewal offer terms or to any material change in the terms of the automatic renewal, as described in this article, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the customer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the customer’s part to the business, including, but not limited to, bearing the cost of or responsibility for shipping any goods, wares, merchandise, or products to the business.~~

1 ~~17608. (a) Notwithstanding Section 17534, a violation of this~~
2 ~~article shall not be a crime. However, all available civil remedies~~
3 ~~that apply to a violation of this article may be employed.~~

4 ~~(b) If a business complies with the provisions of this article in~~
5 ~~good faith, it shall not be subject to civil remedies.~~

6 ~~17609. The following are exempt from the requirements of~~
7 ~~this article:~~

8 ~~(a) Any service provided by a business or its affiliate where~~
9 ~~either the business or its affiliate is doing business pursuant to a~~
10 ~~franchise issued by a political subdivision of the state or a license,~~
11 ~~franchise, certificate, or other authorization issued by the California~~
12 ~~Public Utilities Commission (CPUC).~~

13 ~~(b) Any service provided by a business or its affiliate where~~
14 ~~either the business or its affiliate is regulated by the CPUC, the~~
15 ~~Federal Communication Commission, or the Federal Energy~~
16 ~~Regulation Commission.~~

17 ~~(c) Any entity regulated by the Department of Insurance.~~

18 ~~(d) Alarm company operators, as defined in Section 7590.2,~~
19 ~~and regulated pursuant to Chapter 11.6 (commencing with Section~~
20 ~~7590) of Division 3.~~

21 ~~17610. This article shall become operative on June 1, 2010.~~